IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER	Case No. S252445
Plaintiff and Appellant,	Court of Appeal No. A149328
v.	Alameda County Superior Court No. RG15785743 (Hon. Evelio Grillo)
CITY OF HAYWARD, ET AL.,	
Defendants and Respondents.	

AFTER A DECISION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION THREE

APPLICATION TO FILE AMICI CURIAE BRIEF AND BRIEF OF LEAGUE OF CALIFORNIA CITIES, ET AL., AS AMICI CURIAE IN SUPPORT OF CITY OF HAYWARD ET AL.

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APPLICATION TO FILE

Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court, the League of California Cities (League), California State Association of Counties (CSAC), and California Special Districts Association (CSDA) respectfully request leave to file the accompanying brief in support of Respondents City of Hayward, *et al.*

This brief was entirely drafted by counsel for the Amici and no party or counsel for a party in the pending case authored the proposed amicus brief in whole or in part or made any monetary contribution intended to fund its preparation. (See Cal. Rules of Court, rule 8.520, subd (f).)

INTEREST OF APPLICANTS

Our interest in this proceeding is ensuring that California public agencies are not required to absorb additional costs and obligations associated with responding to requests for public records that were not intended by the California Legislature. Because California cities, counties, and special districts are subject to the California Public Records Act (CPRA, Gov. Code, § 6250 et seq.) and must regularly ensure compliance with the CPRA, any decision affecting application of the CPRA has a significant impact on the workload and budgets of California public agencies.

The Amici believe that this brief will provide additional background and context regarding the importance and practical effects of the outcome of this matter on public agencies and the need to preserve the ability of public agencies to recover limited costs for providing electronic records pursuant to Government Code section 6253.9.

For these reasons, the Amici respectfully request permission to file the accompanying brief as Amici Curiae in this matter in support of the City of Hayward, *et al.*

The League is an association of 475 California cities united in promoting open government and home rule to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life in California communities. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all regions of the State. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as the instant matter, that are of statewide significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

CSDA is a California non-profit corporation consisting of over 800 special district members that provide a wide variety of public services to urban, suburban and rural communities. CSDA is advised by its Legal Advisory Working Group, comprised of attorneys from all regions of the state with an interest in legal issues related to special districts. CSDA monitors litigation of concern to special districts and identifies those cases that are of statewide or nationwide significance. CSDA has identified this case as having statewide significance for special districts.

Dated: June 3, 2019

Respectfully submitted,

By: Jennifer Gore

Jennifer Gore (SBN 232489)

By: Maila Hansen

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California Special Districts Association

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AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

I. INTRODUCTION

While the California Public Records Act (CPRA) was implemented to support the important goal of government transparency, the already significant cost of preparing CPRA responses is ever-increasing with the use of electronic records and databases, particularly police body and vehicle cameras. As this Court has recognized, public agencies receive "thousands and thousands of public records requests each year with the number of requests increasing each year to staggering proportions." (*Ardon v. City of Los Angeles* (2016) 62 Cal.4th 1176, 1189.) These requests place a significant burden on public agencies who are faced with the challenge of protecting and balancing the public's right of access and individual privacy interests, all while being responsible stewards of public funds.

The Amici recognize and support the public's right of access to information under the California Constitution and the CPRA concerning the conduct of the people's business. (See Cal. Const., art. I, § 3; Gov. Code, § 6250, et seq.) But this right of access is not unlimited. (*Copley Press, Inc. v. Super. Ct.* (2006) 39 Cal.4th 1772, 1282.) As explained in detail below, the plain language of Government Code section 6253.9, subd. (b) allows for agencies to recover the costs of extracting confidential or otherwise exempt data from electronic records when programming or other computer services are required. This meaning is further supported by the legislative history. Because the language of the statute and the legislative intent are clear, Article 1, section 3(b) of the California Constitution, which reflects a general policy of increased public access, cannot be used to contradict that legislative intent.

While the ability to recover costs for redacting certain electronic records does not alleviate the workload faced by public agencies related to

CPRA requests, it does alleviate a small portion of the costs borne by the public related to such requests.

The Amici urge the Court to uphold the Court of Appeal's determination that the costs allowable under Government Code section 6253.9, subdivision (b)(2) include the City of Hayward's expenses in utilizing special computer services and programming to compile the police videos and extract exempt material.

II. THE PLAIN LANGUAGE OF GOVERNMENT CODE SECTION 6253.9 ALLOWS FOR THE RECOVERY OF COSTS FOR REDACTING CERTAIN ELECTRONIC RECORDS

In enacting the CPRA, the Legislature declared "that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person." (Gov. Code, § 6250.) However, as recognized by the Court of Appeal, the Legislature was also mindful of the right to privacy. (*National Lawyers Guild v. City of Hayward* (2018) 27 Cal.App.5th 937, 944 (*NLG*), citing Gov. Code, § 6250.) There are numerous exemptions in the CPRA that protect individual privacy rights. (See, e.g., Gov. Code, § 6254, subd. (c), exempting personnel, medical, or similar files; subd. (e), exempting certain information relating to utility systems development; subd. (f), exempting certain records of complaints to, or investigatory records of police agencies.)

If part of a record is exempt from disclosure, an agency cannot withhold the entire record; the agency must determine if the non-exempt portion is "reasonably segregable." (Gov. Code, § 6253, subd. (a).) The CPRA also provides that an agency shall make non-exempt records promptly available to the requesting party "upon the payment of fees covering direct costs of duplication." (Gov. Code, § 6253, subd. (b).)

The Amici do not dispute that the police body camera videos at issue are potentially disclosable "public records," subject to the applicable exemptions, which may result in the deletion or redaction of exempt portions to protect privacy and security concerns. Instead, the Amici seek to provide on-the-ground context to the issue in dispute: whether the language of Government Code section 6253.9 (Section 6253.9) allowing a public agency to charge for producing a copy of the record when "extraction" is required was intended to allow an agency to recoup the cost of extracting or redacting exempt portions from a video or audio recording to produce a disclosable copy.

In revising the CPRA in 2000, the Legislature added Section 6253.9 to specifically address the growing prevalence of electronic records. (Assem. Bill No. 2799 (1999-2000 Reg. Sess.) Legislative Counsel's Digest, as amended June 22, 2000 (AB 2799).) In doing so, the Legislature removed an agency's discretion to determine the form that a public record is provided, requiring instead that an agency produce a disclosable public record in any electronic format in which it was held by the agency, unless the release of the record in the electronic form would compromise the security of the record or any proprietary software in which it was maintained. (Assem. Bill No. 2799 (1999-2000 Reg. Sess.) §2, as amended June 22, 2000.)

To balance this and to address concerns raised by stakeholders, the Legislature also provided that a requester would bear certain costs for "producing a copy of the record." (Gov. Code, § 6253.9, subd. (a)(2).) When merely duplicating an existing electronic record, the recoverable costs would be limited to the direct cost of producing a copy in an electronic format. (*Ibid.*, mirroring Gov. Code, § 6253, subd. (b).) However, the Legislature also provided that an agency may recoup the cost of producing a copy of the electronic record, including the cost to construct

a record, and the cost of programming and computer services necessary to produce a copy of the record when, among other things, the "request would require data compilation, extraction, or programming to produce the record." (Gov. Code, § 6253.9, subd. (b).)

The Amici believe that the plain meaning of Section 6253.9, subdivision (b), allows agencies to recover their costs for programming and computer services to remove exempt material from electronic records prior to producing copies. The Court need look no further than the dictionary definition of the word "extraction," which means "the action of taking out something" and its synonyms, as reflected in the City of Hayward's brief. (Answer Brief on the Merits, at p. 32.) However, if the Court disagrees and finds that the term "extraction" is reasonably susceptible to more than one meaning, the legislative history confirms that the Legislature intended to authorize the recovery of additional costs incurred in preparing certain electronic records for public release when it enacted Section 6253.9.

III. THE LEGISLATIVE HISTORY REFLECTS THE LAWMAKERS' INTENT TO ALLOW AGENCIES TO RECOVER COSTS FOR PROGRAMMING AND COMPUTER SERVICES TO REDACT ELECTRONIC RECORDS

The stated need for the legislation adding Section 6253.9 to the CPRA, as reflected in multiple bill analyses, was to ensure that a person seeking electronically available records could obtain such records in that format. (Assem. Com. on Gov. Organization, Analysis of AB 2799 as introduced Feb. 28, 2000, p. 1; Sen. Judiciary Com., Analysis of AB 2799 as amended June 22, 2000, p. 3; Sen. Rules Com., Analysis of AB 2799 as amended July 6, 2000, p. 1.) It was meant to stop agencies from requiring that a member of the public buy a printed copy of records that were stored by the agency electronically, "especially when the records are voluminous,"

as this practice made the records "practically inaccessible to the public" (due to costs) and sometimes rendered the information useless. (Sen. Judiciary Com., Analysis of AB 2799 as amended June 22, 2000, p. 3.)

A. The legislative history shows that the bill was amended on June 22, 2000, to allow for cost recovery for programming and computer services

While the City of Hayward has provided an exhaustive description of the legislative history reflecting that AB 2799 was amended to allow for cost recovery for redacting certain electronic records, the Amici would like to further emphasize the history reflected in the legislative analyses. These key documents reflect the Legislature's intent to allow public agencies to recover additional costs related to preparing an electronic record for public release.

The Assembly Committee on Governmental Organization's Analysis on AB 2799 as amended on April 27, 2000, reflects that the opponents remaining after the "reverse balancing test"[1] was removed from the bill were concerned that redacting exempt information from electronic records "could be a costly and time-consuming process that is more vulnerable to error, which may result in the unintentional release of non-disclosable information," and that the bill had no "provision authorizing agencies to charge fees covering the cost of preparing the records for public release." (Assem. Com. on Governmental Organization, Analysis of AB 2799 as amended May 23, 2000, pp. 2-3; Assem. Floor, 3rd reading Analysis of AB 2799 as amended May 23, 2000, p. 3.) The Senate Judiciary Committee's Analysis of SB 2799 reflects that the parties still opposed to the bill

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[1] See Answer Brief on the Merits, at pp. 41-42 (discussing the reverse balancing test included in the bill as introduced); *see also* Assem. Com. on Gov. Organization, Analysis of AB 2799 as introduced Feb. 28, 2000, pp. 3-4.

included the County of Los Angeles, the California State Sheriff's Association, the California Association of Clerks and Election Officials, and Orange County.[2] (Sen. Judiciary Com., Analysis of SB 2799 as amended June 22, 2000, p. 10.)

1. Opposition largely dissolved following the addition of cost recovery provisions for electronic records

The legislation was amended on June 22, 2000, to add language allowing for an extension in time to respond to a records request in the "unusual circumstance" that there is a "need to compile data, to write programming language or a computer program, or to construct a computer report to extract data." (Assem. Bill No. 2799 (1999-2000 Reg. Sess.) §1, as amended June 22, 2000.) At the same time, Section 6253.9 was revised to add the following language:

> The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format.
>
> (b) Notwithstanding paragraph (2) of subdivision (a), the requester shall bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when either of the following applies:
>
> (1) In order to comply with the provisions of subdivision (a), the public agency would be required to

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[2] The history reflected in the bill analysis is also reflected in the California Association of Clerks and Election Officials' opposition letters, dated May 3, 2000, and May 11, 2000, which state that the organization continued to oppose the bill due to the author's failure to address public agency costs associated with redaction of any information that is exempted or prohibited from disclosure. (Co-chair Violet Varona-Lukens, CACEO, Letter to Assem. Member Kevin Shelley, May 3, 2000, pp.1-2; Co-chair Violet Varona-Lukens, CACEO, Letter to Assem. Member Carole Midgen, May 11, 2000, pp. 1- 2.)

> produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals.
> (2) The request would require data compilation, extraction, or programming to produce the record.
> (Assem. Bill No. 2799 (1999-2000 Reg. Sess.) §2, as amended June 22, 2000.)

Based on the June 22, 2000, amendment, all of the parties still objecting to the bill, with the exception of Orange County, shifted their position to neutral. (Sen. Judiciary Com., Analysis of SB 2799 as amended June 22, 2000, p. 10.)

These legislative analyses, when read together, reflect that the June 22, 2000, bill amendments addressed the opponents' objections to the inability to recover costs for preparing public records for release. The amendment did not change the fact that redacting exempt information from electronic records "could be a costly and time-consuming process that is more vulnerable to error, which may result in the unintentional release of non-disclosable information." (Assem. Com. on Governmental Organization, Analysis of AB 2799 as amended April 27, 2000, pp. 2-3; Assem. Floor Analysis, 3rd reading of AB 2799 as amended May 23, 2000, p. 3.) Therefore, the basis for their change in position must have been related to the addition of language allowing agencies to recover the cost of preparing the records for public release. [3] (See Assem. Com. on

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[3] Subsequent letters from the California State Sheriff's Association (dated June 22, 2000), the County of Los Angeles (dated June 23, 2000), and the California Association of Clerks and Election Officials (dated June 21, 2000), also confirm that they no longer opposed the legislation following the amendment reflected above. (Legislative Advocate Nick Warner, California State Sheriffs' Association, Letter to Senate Judiciary Chair Adam Schiff, June 22, 2000; Principal Deputy County Counsel Steve Zehner, County of Los Angeles, Letter to Assem. Member Kevin Shelley,

Governmental Organization, 3d reading analysis of AB 2799 as amended May 23, 2000, p. 3.)

2. *This history reflects that Orange County remained concerned over the diversion of staff time, irrespective of whether it could recover costs.*

While it is true that the bill analyses reflect that Orange County did not remove its opposition following the June amendment, the history reflects that this position was based on the County's concern that "staff could be required to spend considerable time *copying and editing* electronic records, determining if they are appropriate for public disclosure and responding with written justifications if the requests are denied." (See Sen. Judiciary Com., Analysis of AB 2799 as amended June 22, 2000, pp. 9-10 [emphasis added]; Sen. Rules Com., 3d reading analysis of AB 2799, as amended July 6, p. 10; see also Carpenter Snodgrass & Associates, Memo to Senate Judiciary Committee Chair Adam Schiff, June 20, 2000.)

This statement does not, however, mean that the amendments did not allow for the recovery of costs for computer services and programming to prepare the records for release, as suggested by the Petitioner. (Petitioner's Opening Brief on the Merits, at pp. 50-53.) Orange County's continued objection was related to the *time* that could be required to copy and edit electronic records; it says nothing about whether they understood the bill, as amended, to allow them to recover additional costs. (See Sen. Judiciary Com., Analysis of AB 2799 as amended June 22, 2000, pp. 9-10; Sen. Rules Com., 3d reading analysis of AB 2799, as amended July 6, p. 10.)

June 23, 2000; Co-chair Violet Varona-Lukens, CACEO, Letter to Assem. Member Carole Midgen, June 21, 2000, p.1, stating that the bill "now addresses the costs incurred by public agencies in providing copies of electronic records under circumstances now described in the bill.")

There is no question that Section 6253.9 requires agencies to spend considerable time copying and editing records, as demonstrated in Section V. below, in response to CPRA requests. This substantial diversion of resources is necessarily disruptive to public agencies, regardless of whether the agencies are permitted to recover some of their related costs for these activities. This is particularly true for small agencies with limited staffing and budgets, who typically do not have a clerk's office dedicated to maintaining records and responding to records requests. While responding to records requests is part of the regular function of public agencies, it is a particularly difficult task to staff and budget for given that: (1) the number, timing, and complexity of record requests varies week to week and month to month; (2) the statutory response timeframes are short; and (3) based on the short response deadlines and the agency experience needed to identify records and determine what is and is not disclosable, it is generally not a function that can be performed by temporary staff. Regular staff must be shifted from other projects in order to locate and provide records timely.

The legislative history reflects that Orange County objected to the time required to make copies and edit electronic records to make them available to the public. Since the direct cost of copying records was clearly recoverable under the proposed bill, this suggests that Orange County's continued objection was not related to costs at all.

B. This Court's decision in Sierra Club *does not compel a different interpretation of the legislative intent*

In *Sierra Club v. Superior Court*, this Court briefly addressed the legislative history of Section 6253.9 and found that it was inconclusive on the question of whether GIS-formatted files were exempt from disclosure as "computer software" (a term that includes computer mapping systems) or were instead disclosable records. (*Sierra Club v. Super. Ct.* (2013) 57

Cal.4th 157 (*Sierra Club*).) Finding no clear indicia of legislative intent to exempt GIS-formatted databases from disclosure, this Court narrowly construed the term "computer mapping system" to further the constitutional mandate in Article 1, section 3, subdivision (b)(2) of the California Constitution in favor of access. (*Id.* at p. 175.) Nevertheless, Petitioner attempts to extract a ruling from *Sierra Club* limiting the recoverable costs under Section 6253.9, subdivision (b)(2), even though that issue was not addressed.

In *Sierra Club* this Court heard from agencies concerned that the electronic disclosure of "massive databases" would require significant amounts of *staff time*[4] to redact exempt information. In response to arguments that the Court should find the records exempt on this basis, the Court's decision in *Sierra Club* mentions that this was the concern raised by Orange County in 2000. (*Sierra Club*, *supra*, 57 Cal.4th at pp. 174-175 [emphasis added], citing Assem. Com. on Governmental Organization, Analysis of Assem. Bill 2799 (1999-2000 Reg. Sess.) as amended Apr. 27, 2000, pp. 2-3.)

This Court noted in *Sierra Club* that the Legislature did not adopt amendments to respond to Orange County's concern about the consumption of time. (*Sierra Club*, *supra*, 57 Cal.4th at pp. 174-175.) This Court did not speak at all to the issue of whether costs were recoverable or suggest that cost was the basis for Orange County's objection. (*Ibid.*) The opinion correctly states only that Orange County objected to the amount of staff time that could be required to produce electronic records; the opinion does

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[4] As discussed above, this concern about *time* was distinct from the concerns raised by several other agencies about the resulting *cost* of redacting electronic files (*Ante,* at pp. 8-9.)

not suggest that the Legislature failed to address cost recovery, or that Orange County continued to object to the bill on that basis. (*Ibid.*)

C. The definition of "extraction" put forth by Petitioner is not supported by the legislative history.

The Petitioner urges the Court to find that "extraction" means to remove something to create or produce something else, arguing that this definition is consistent with the language of Section 6253.9, subdivision (b)(2) ("The request would require data compilation, extraction, or programming to *produce the record.*") (See Reply Brief on the Merits, at p. 17 [emphasis added by Petitioner].) The Petitioner provides examples of electronic records requiring "extraction," such as the creation of a basketball highlights video or taking a clip of a gunshot out of a longer police video. (Reply Brief on the Merits, at p. 17.) However, Section 6253.9, subdivision (b)(2) also covers the extraction of exempt portions of a video file (i.e., redaction) needed to produce those records in compliance with the CPRA.

In addition, Petitioner's interpretation is directly contrary to the legislative history. The legislative analyses related to the addition of Section 6253.9 make it clear that the Legislature contemplated making existing documents, such as financial and environmental reports, available in the format they were held by the agency to avoid the expense and waste related to printing these documents rather than providing "a disk" or CD. (Sen. Judiciary Com., Analysis of AB 2799 as amended June 22, 2000, p. 7; Sen. Rules Com., Analysis of AB 2799 as amended July 6, 2000, p. 6.) To the extent the section refers to allowing an agency to recoup its costs to "construct" a record,[5] the language of the statute is clear that this is limited

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[5] To interpret this section to require public agencies to construct new records, as Petitioner suggests, rather than to produce copies of existing

to producing a record that is usually produced at other intervals, or when the request requires data compilation, extraction, or programming needed to prepare a record for public release, such as removing exempt data from a record.[6] (Gov. Code, § 6253.9, subd. (b); see also General Counsel Thomas

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electronic reports and records, could effectively make public agencies a research arm of private commercial or research entities and would allow these organizations to hijack a significant portion of an agency's work through the guise of CPRA requests. This would be particularly burdensome to small special districts with limited staffs and budgets. Even if an agency is permitted to recoup its direct costs, this has the potential to be extremely disruptive and to redirect agency resources to priorities established by commercial enterprises rather than the agency's staff and governing board. Agencies should not be compelled to mine their data to produce reports in a form requested by a private organization. The CPRA requires agencies to disclose existing reports and documents produced by an agency, not to create new records on behalf of a requesting party. (*Sander v. Super. Ct.* (2018) 26 Cal.App.5th 651, 667.)

[6] Petitioner suggests that if the Legislature had intended to allow cost recovery for "redacting" electronic records, it would have used that term, as that was the language presented in the opposition letters. (Reply Brief on the Merits, at p. 26.) But on a close read, the legislative history confirms that the language of the bill opponents was used in crafting the amendment.

In the County of Los Angeles' letter, dated May 22, 2000, the County objected to the broad approach of the bill, specifically noting that the County's time keeping system contained data that would require "special *programming* to provide information without jeopardizing employee privacy." (Principal Deputy County Counsel Steve Zehner, County of Los Angeles, Letter to the Assembly Floor with a copy to each Assembly Member, May 22, 2000 [emphasis added].)

There is also a handwritten note on a copy of the bill documenting that the California Association of County Clerks and Officials raised electronic record redaction, reflecting that "*extracting* data from electronic database is a cost – it takes time and causes operational headaches," and

W. Newton, Cal. Newspaper Publishers Assn., Letter to Gray Davis, Sept. 8, 2000, p. 2, reflecting that the bill was amended to guarantee that "the costs associated with any extra effort that might be required to make an electronic public record available shall be borne by the requester, not the state or local agency.") Such costs would include editing a database containing raw, confidential data alongside disclosable data to remove the confidential data prior to prepare it for release prior to producing it to the requesting party.

There is no basis in the legislative history to support a definition of "extraction" that requires the creation of new records in response to a request under the CPRA.

IV. THE CONSTITUTIONAL MANDATE DOES NOT REQUIRE THE RULE OF NARROW CONSTRUCTION BE APPLIED IN THE FACE OF CLEAR LEGISLATIVE INTENT TO THE CONTRARY

Petitioner argues that if the Court finds the statutory interpretations advanced by both parties equally valid, then Article 1, Section 3(b)(2) of the California Constitution "is the tie-breaker" and mandates that the Court

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that there is a higher cost to redacting electronic records versus paper copies. (LH:570 [Author's File, Notes on Cal. Assoc. of County Clerks and Officials Opposition to Assem. Bill No. 2799 (emphasis added)].)

Contrary to Petitioner's argument, it was these terms – "extracting" and "programming" – that were incorporated in Section 6253.9, subdivision (b)(2) to allow cost recovery. (See General Counsel Thomas W. Newton, CNPA, Letter to Gray Davis, September 8, 2000, p.2, confirming that the added provision guarantees that the costs associated with any extra effort that might be required to make an electronic public record available shall be borne by the requester, not the state or local agency.")

interpret Section 6253.9 to "favor disclosure without the constraints that are imposed by putting a price on access." (Reply Brief on the Merits, at p. 11.)

However, Petitioner ignores subsection (5) of the same subdivision of the Constitution, which provides: "This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records." (Cal. Const., art. I, §3, subd. (b)(5).) This Court has interpreted such language to mean that the courts cannot "countermand the Legislature's intent to exclude or exempt information from the CPRA's disclosure requirements where that intent is clear." (*Sierra Club*, *supra*, 57 Cal.4th at 166; see also *Newark Unified School Dist. v. Super. Ct.* (2015) 245 Cal.App.4th 887, 907, relying on *Sierra Club*.)

In the case now before the Court, the Court of Appeal found the legislative intent to be clear, and therefore was not compelled by the Constitution to construe the section in favor of access. (*NLG*, *supra*, 27 Cal.App.5th at pp. 951-952.) The Amici urge the Court to uphold the Court of Appeal's determination.

V. THE BURDEN ON PUBLIC AGENCIES TO PRODUCE VIDEO RECORDS CONTINUES TO GROW

As technology evolves, an increasing amount of police actions are recorded on video. This allows greater public evaluation of police activity, but it also means public agencies may retain an enormous amount of video footage at any given time and there can be a huge volume of potentially responsive material in response to a single CPRA request. Interpreting Section 6253.9 to allow limited cost recovery by public agencies for time spent redacting certain electronic records helps CPRA requestors focus their inquiries within reasonable parameters and receive the specific information sought in an expedient manner. Public agencies are actually

required to assist CPRA requestors in "mak[ing] a focused and effective request that reasonably describes an identifiable record or records," and minimal charges to the requestor may assist public agencies in complying with such requirement. (Gov. Code, § 6253.1.)

As previously noted by this Court, "[p]ublic agencies are confronted with thousands and thousands of public records requests each year with the number of requests increasing each year to staggering proportions." (*Ardon, supra*, 62 Cal.4th at 1189.) The swelling number of CPRA requests along with the rising volume of electronic records maintained by public agencies creates big hurdles for already cash-strapped agencies.[7] Public agencies "responding to a request for mass production must engage in a laborious, time consuming process." (*Id.* at p. 1188.)

An enormous number of CPRA records produced today are electronic records[8], yet CPRA case law does not adequately account for the burden on public agencies in retrieving, reviewing, redacting, and producing astronomical quantities of electronic records in a timely fashion. In an effort to address rapidly evolving technology, this Court has noted that "the CPRA should be interpreted in light of modern technological realities." (*Am. Civ. Liberties Union Foundation v. Super. Ct.* (2017) 3

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[7] Williamson, *Industries Turn Freedom of Information Requests on Their Critics*, The New York Times (Nov. 5, 2018) ["In 2009, the [University of California] system received a total of 3,266 public records requests. In 2017, it received 16,921, an increase of 418 percent."]

[8] Section 6253.9 states that "[u]nless otherwise prohibited by law, any agency that has information that constitutes an identifiable public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that information available in an electronic format when requested by any person."

Cal.5th 1032, 1041.) Accordingly, the CPRA should provide a reasonable framework for California public agencies to balance disclosure of records with their central governmental function of providing myriad government services to a growing number of residents. Even with some provision of cost recovery under Section 6253.9, subdivision (b), public agencies face a daunting task responding to CPRA requests that keep growing in number at the same time that technology continues to increase the variety, volume, and type of public records maintained in ever expanding databases.[9]

Nonspecific, unfocused, and overly broad CPRA requests take longer to process and divert public agencies from performing other crucial services for the general public. Some CPRA requests, while identifying records maintained by the public agency, are very broad and necessarily consume dozens of agency hours, if not much more. When an individual CPRA request is extremely broad, the public agency is forced to spend a tremendous amount of time on that one CPRA request, which can result in less timely responses to other CPRA requestors.[10]

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[9] An attorney in the Seattle City Attorney's Office described reviewing and redacting police video as "being on the Titanic . . . and you've got a teaspoon to bail." (Funk, *Should We See Everything a Cop Sees?* The New York Times (Oct. 18, 2016).)

[10] Kadvany, *District Seeks to Limit 'Unduly Burdensome' Public Records Requests*, Palo Alto Online (Jun. 19, 2018) ["Facing a 453 percent increase in the number of Public Records Act requests filed this year, the Palo Alto school district is looking to focus 'overly broad' requests that have resulted in a backlog of tens of thousands of documents . . . [because such CPRA requests] impose financial and other burdens on the district and inhibit it from responding to CPRA requests from other requesters in a timely manner."]

Recently enacted California laws SB 1421 and AB 748 will further increase the number of police CPRA requests agencies receive, particularly for video and audio recordings that often require a cumbersome redaction process before they can be produced. SB 1421, effective January 1, 2019, requires additional disclosure of several categories of police records under the CPRA, including records relating to: incidents involving discharge of a firearm by a peace or custodial officer; incidents in which the use of force by a peace or custodial officer results in death or great bodily injury; incidents in which a sustained finding was made by a law enforcement agency or oversight agency that a peace or custodial officer engaged in sexual assault involving a member of the public; and incidents involving a sustained finding of dishonesty by a peace or custodial officer.

AB 748 is effective on July 1, 2019, and requires agencies to produce police video and audio recordings of "critical incidents" involving discharge of a firearm or use of force resulting in death or great bodily injury. SB 1421 and AB 748 obviously provide a benefit to the public in the form of police transparency, expanding the scope of video and audio records released under the CPRA requires agencies to devote additional resources to CPRA requests at the expense of providing other public services, including responses to other CPRA requests.

However, limited cost recovery for computer services and programming to compile video and audio records and extract exempt information helps mitigate the burden of CPRA requests on public agencies. CPRA fees and costs serve an important purpose because they help prevent overly broad and wasteful "fishing expeditions." They also help agencies recoup some limited funds for the ever-growing amount of staff time needed to respond to CPRA requests, thus supporting the broader effort of record disclosure. Courts have previously recognized the "multifaceted nature of access" and "that the fees charged to a person

requesting a copy of an official record are an important factor relating to access, but fees are not the exclusive factor relevant to access." (*Cal. Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432, 1451-1452.) Thus, fees and costs do not eliminate access to public records. In fact, fees which are too low can reduce "the ease and speed of access" to records and "could lead to reduction in the number of hours the clerk-recorder's office takes requests for copies and an increase in the time that elapses between the submission of the request and the delivery of the copy to the customer." (*Ibid.*) Accordingly, diminution in revenue to public agencies could result in negative outcomes to CPRA responses and government operations.

Appellant's assertion that allowing limited cost recovery under Section 6253.9 would make access to electronic records "unaffordable to all but affluent requesters" is an exaggeration.[11] (Petitioner's Opening Brief on the Merits, at p. 27.) Requestors making specific and focused requests for the records sought (or requestors willing to work with public agencies to identify the records sought) will be charged minimally for such records as those requests will not require a large amount of programming or computer services to redact a multitude of records that may not be relevant to the requestor's inquiry. Focused CPRA requests also help reduce the burden on

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[11] There is also evidence demonstrating that most requestors of public records are in fact corporate businesses instead of concerned taxpayers. (See Williamson, *Industries Turn Freedom of Information Requests on Their Critics*, The New York Times (Nov. 5, 2018) ["A 2017 analysis of requests filed under the Freedom of Information Act found that 'public-oriented inquiries by concerned citizens and their advocates' account for 'only a small fraction of the 700,000-plus FOIA requests submitted each year' . . . . The bulk of requests come from businesses seeking to further their own commercial interests by learning about competitors, litigation opponents or the regulatory environment."].)

CPRA requestors in potentially reviewing thousands of records to find the few pieces of information actually sought.

To provide some context regarding the growing burden that CPRA requests place on public agencies, the Amici requested data from several California public agencies regarding the amount of police CPRA requests received by the agencies and the staff time involved in responding to such requests. As previously noted, the volume of requests and amount of staff time spent will likely increase dramatically given the recent passage of SB 1421 and AB 748. With nearly 500 cities, 58 counties, 3,400 special districts, and other types of public agencies in California, the impact of even limited cost recovery is significant.

In 2017, the City of Sacramento Police Department received 770 CPRA requests with 121 requests involving production of police videos.[12] In 2018, the City of Sacramento received 979 CPRA requests with 215 requests involving production of police videos. Sacramento Police Department staff estimate it takes approximately 132 minutes to redact one hour of daytime police video footage and then an additional 60 minutes for the specialized computer to process and output the redacted video. For nighttime footage, the low-light naturally blocks some of the background content, and it only takes approximately 80 minutes to redact one hour of nighttime police video footage and 45 minutes for the specialized computer to process and output the redacted video. The above-described time periods are also frequently augmented by an initial viewing of the video before redactions begin and a secondary viewing after redacting to double-check

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[12] Information provided on April 5, 2019, by a Program Analyst with the City of Sacramento Police Department.

the redactions. Including such initial and secondary time adds approximately 1.25 hours of staff time for every one hour of video footage.

In 2018, the Sheriff's Office for the County of Sacramento received 218 CPRA requests for police records.[13] In 2019, the Sheriff's Office has received 253 CPRA requests for police records as of May 17, 2019. In response to the recent passage of SB 1421, the Sheriff's Office established a Prepublication Review Unit (Unit) that reviews and redacts police records before releasing them pursuant to a CPRA request. The Unit has eight employees working full-time and one employee working part-time. The Unit contains seven full-time Sheriff's Records Officer I employees with an hourly rate of $73, one full-time Sheriff's Sergeant with an hourly rate of $124, and one part-time Sheriff's Deputy with an hourly cost of $57. The Sheriff's Office estimates that it takes one employee two minutes to redact each still photograph, two minutes to redact each minute of audio recording, and two hours to redact each minute of video recording. The Sheriff's Office is also planning to purchase special software called Motion DSP's Spotlight Product for approximately $30,000 to assist with extraction of data, redaction of video images and audio, and to enable review and editing of large segments of integrated multimedia.

The Los Angeles Police Department (LAPD) has adopted the wide-spread use of body-worn and vehicle mounted cameras for frontline officers. These cameras capture tens of thousands of hours of video each month, many of which are now subject to production under the CPRA and SB 1421. For example, in 2018 LAPD received 2,887 CPRA requests, 259 of which requested police videos. In 2019 to date, LAPD has received over 1,000 CPRA requests. Of these, 183 requested video and audio records that

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[13] Information provided on May 17, 2019 by a Sheriff's Lieutenant with the Sheriff's Office for Sacramento County.

the LAPD will have to review and redact to prepare them for public disclosure under SB 1421. As SB 1421 becomes more widely known, LAPD anticipates a further increase in video requests.

Just the salaries of the personnel hired to operate LAPD's CPRA unit totaled just short of $2 million in 2018. This will increase to about $2.5 million in 2019 due to the addition of three full-time positions (for a total of 14), who were hired, in part, in anticipation of the additional non-video workload resulting from the passage of SB 1421. This staffing is independent of the additional workload expected from redacting audio and video records. This also does not include the additional expense for new equipment and software, or new upgrades to existing systems, which LAPD is still evaluating, to efficiently review, redact, and reformat the anticipated requests for video and audio files. LAPD currently estimates that, on average, video review and redaction will be 5:1 (five hours for each hour of video), with 3:1 for audio files, each completed at a cost of $64 per hour. Based on these ratios and the number and scope of 2019 requests to date, LAPD estimates an additional workload of over 2,800 hours will be required in 2019 just to redact the audio and video files requested under the CPRA and SB 1421.[14]

In 2018, the City of San Diego received 76 requests for police video. In 2019, it had received 44 requests as of April 17, 2019.[15]

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[14] Information provided on May 30, 2019, by the Legal Affairs Division of the City of Los Angeles Police Department.

[15] Information provided on April 17, 2019, by a Program Manager for Public Records Administration with the City of San Diego Police Department.

The Sonoma County Sheriff's Office received ten CPRA requests for body-worn camera videos in 2018 and has received 15 CPRA requests for body-worn camera videos in 2019 as of May 20, 2019. The Sonoma County Sheriff's Office estimates that it takes approximately two hours to redact 30 minutes of video footage.[16]

Since January 2019, the City of Richmond has received 34 CPRA requests that essentially seek every record disclosable under SB 1421. The City of Richmond's Police Department spent 25 hours redacting police video footage for one request. One attorney in the City Attorney's Office estimated she spent over 200 hours since January 2019 responding to police-related CPRA requests.[17]

In 2018, the City of Burbank received 800 CPRA requests for police records, with eight of the requests specifically for police video. In 2019, the City of Burbank has received 225 CPRA requests as of March 22, 2019, two of which specifically request police video. The City of Burbank does not yet have body-worn cameras.[18]

Government efficiency and provision of services to citizens will suffer if public agencies are forced to respond each year to thousands of "fishing expedition" CPRA requests with limited resources to hire additional public records personnel or obtain new software to assist in such effort. Limited cost recovery for redacting lengthy police video and audio files helps public agencies keep afloat in a rising sea of CPRA requests.

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[16] Information provided on May 20, 2019, from the Executive Director of the County Counsels' Association and Litigation Counsel of the CSAC.

[17] Information provided on May 30, 2019 by an attorney in the Richmond City Attorney's Office.

[18] Information provided on March 26, 2019 by a Police Records Manager with the City of Burbank Police Department.

VI. LIMITED COST RECOVERY ENABLES PUBLIC AGENCIES TO BALANCE DISCLOSURE OF RECORDS WITH PRIVACY CONCERNS AND EFFECTIVE PROVISION OF GOVERNMENT SERVICES

There is no dispute the CPRA serves a crucial role by informing the public about the functions of its government and enhancing accountability of public officials. (*Bertoli v. City of Sebastopol* (2015) 233 Cal.App.4th 353, 365 ["In order to verify accountability, individuals must have access to government files. Such access permits checks against the arbitrary exercise of official power and secrecy in the political process."].) Furthermore, the Amici fully understand that "given the extraordinary authority with which they are entrusted, the need for transparency, accountability and public access to information is particularly acute when the information sought involves the conduct of police officers." (*Pasadena Police Officers Assn. v. Super. Ct.* (2015) 240 Cal.App.4th 268, 283.)

However, disclosure of law enforcement records under the CPRA must be balanced with protecting the privacy rights of individuals and the ability of government to function effectively and efficiently. "[J]udicial decisions interpreting the [CPRA] seek to balance the public right to access of information, the government's need, or lack of need, to preserve confidentiality, and the individual's right to privacy." (*Copley Press, Inc.*, *supra*, 39 Cal.4th at 1282.) Proposition 59 maintained this balancing of interests, enshrining in the California Constitution both a guarantee for access to public records and a commitment to preserving an individual's right to privacy. (Cal. Const., art. I, § 3, subds. (b)(1), (b)(3).)

The right of access to government records in the CPRA "is expressly qualified by the assurance that such right of access is not meant to supersede or modify existing privacy rights." (*Bertoli*, *supra*, 233 Cal.App.4th at p. 366.) Portions of public records must necessarily be

redacted to protect the privacy of individuals. For example, the identities of victims of certain types of crimes, including minors and victims of sexual assault must be withheld in certain circumstances. (Gov. Code, § 6254, subd. (f).) Additionally, police records are redacted in situations where disclosure would endanger a witness. (*Ibid.*) However, such balancing often catches public agencies between a rock and a hard place: "[i]f [the agency] refuses to disclose the information, it faces the possibility of defending an action by [the requestor] to enforce the CPRA. If it fails to justify the nondisclosure, it will be liable for court costs and attorney fees. Moreover, if voluntary disclosure results in the unwarranted invasion of privacy, it becomes exposed to a civil suit for damages." (*City of Santa Rosa v. Press Democrat* (1987) 187 Cal.App.3d 1315, 1322.)

Body-worn camera footage presents one particular example of the balancing dilemma between public access of records and privacy concerns. Body-worn cameras have been hailed by some as a powerful tool to reduce police violence and ensure accountability.[19] "However, public access to information must sometimes yield to personal privacy interests." (*City of San Jose v. Super. Ct.* (2017) 2 Cal.5th 606, 615.) Body-worn cameras can capture law enforcement's excessive use of force, but they also capture many police events for which participants or victims have legitimate privacy concerns should such footage appear on the internet (such as car accidents, domestic violence, medical emergencies, outreach with homeless

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[19] Although a two-year study of the Washington, D.C. body-worn police cameras revealed that "[h]aving police officers wear little cameras seems to have no discernible impact on citizen complaints or officers' use of force." (Greenfieldboyce, *Body Cam Study Shows No Effect on Police Use of Force or Citizen Complaints*, National Public Radio (Oct. 20, 2017.)

individuals, human trafficking, or drug usage).[20] And new technological advances, such as facial recognition software, implicate greater and greater privacy concerns. Individuals request police assistance in the most vulnerable times of their lives and they should not be discouraged from contacting police by fear that such police assistance will result in further trauma through disclosure of audio and video footage containing their faces, homes, personal contact information, or intimate conversations.

Government Code section 6254 exempts a long list of items from disclosure under the CPRA to "reflect the reality that, in order to perform their many functions, government agencies must gather much information, some of which the parties providing the information wish to be kept confidential." (*Ardon, supra*, 62 Cal.4th at p. 1183.) Although access to public records helps verify government accountability, "a narrower but no less important interest is the privacy of individuals whose personal affairs are recorded in government files." (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651.) Without adequate resources and staff to redact police videos, footage that invokes privacy concerns may be released into the public sphere as agencies struggle to meet production deadlines.

If public agencies face rapidly increasing numbers of CPRA requests for police videos but cannot recover any costs for the many hours of staff time that must be spent on such CPRA requests, public agencies will likely

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[20] See Marolow & Stanley, *We're Updating Our Police Body Camera Recommendations for Even Better Accountability and Civil Liberties Protections*, ACLU Blog (Jan. 25, 2017) ["Our view is that for privacy reasons, the majority of body-camera video should not be subject to public release."]; Funk, *Should We See Everything a Copy Sees?* The New York Times (Oct. 18, 2016) [a prolific public records requestor wanted to make all Seattle police videos public on YouTube, but quickly realized "that certain things shouldn't be made public."]

be unable to devote additional resources to CPRA requests and privacy interests in public records may suffer. One example could be inadvertent release of private information due to high volumes of CPRA requests and a finite number of staff. This Court has noted that "the number of requests seems to be increasing each year . . . Public entities recognize that they must function under these pressures, and they can always strive to do better . . . [b]ut the logistical problems public entities can face in reviewing, in some cases, even thousands of pages of records responsive to a public records request . . . is daunting. It would be foolish to believe that human errors in the processing of public records requests will cease." (*Ardon*, *supra*, 62 Cal.4th at p. 1189.)

Inadvertent disclosure of private information in police records could have significant effects on public safety. (*Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 653 ["[e]ffective enforcement of penal laws depends to no small extent upon the readiness of citizens to complain of alleged crime. Complainants often demand anonymity. The prospect of public exposure discourages complaints and inhibits effective enforcement."].) A limited amount of cost recovery, on the other hand, will enable public agencies to devote more resources to protecting privacy interests of the individual members of the public.

Public agency police records are also often redacted to protect ongoing investigations, police tactics or deliberations, or the safety of the public. This Court has acknowledged that "even democratic governments require some degree of confidentiality to ensure, among other things, a candid exchange of ideas and opinions among responsible officials." (*Times Mirror Co. v. Super. Ct.* (1991) 53 Cal.3d 1325, 1328.) As electronic records become the primary medium for public agencies, more and more records are retrieved when searching for responsive records and agencies

must spend tremendous resources redacting information to preserve the government's ability to conduct business operations.

Eliminating cost recovery for programming and computer services for redacting police videos may hinder law enforcement's ability to perform its duties on the street in a safe and efficient manner because law enforcement personnel may be concerned with inadvertent disclosure of exempt decisionmaking deliberations. As noted in the cases involving the "deliberative process" privilege under Government Code section 6255, "[t]o disclose every private meeting . . . and expect the decisionmaking process to function effectively, is to deny human nature and contrary to common sense and experience." (*Times Mirror Co., supra*, 53 Cal.3d at 1345.) Recovery for limited components of costs for responding to CPRA requests allows appropriate resources to be devoted to CPRA requests and law enforcement the ability to focus on protecting and defending its citizens.

VII. CONCLUSION

Cost recovery in certain limited circumstances has been a component of the CPRA since its inception. It permits public agencies to continue allocating resources towards responding to CPRA requests and also incentivizes requestors to evaluate the scope of records actually desired prior to submitting a CPRA request. "The purposes of the CPRA should be honored through such a reasonableness standard, so that not only an agency response, but the request that generates it, are within reasonable boundaries that are appropriate in light of the statutory scheme." (*Fredericks v. Super. Ct.* (2015) 233 Cal.App.4th 209, 228.) Cost recovery does not eradicate access to records – it enables agencies to continue providing records in a reasonable manner while also performing other core government services with increasingly limited resources. Cost recovery helps ensure that both

the CPRA request and the public agency's response are reasonable given the circumstances.

For the foregoing reasons, the Amici request that the Court uphold the Court of Appeal's determination that the costs allowable under Section 6253.9, subdivision (b)(2) include the City of Hayward's expenses in utilizing special computer services and programming to compile the police videos and extract exempt material.

Dated: June 3, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT 8.204, subd. (c)(1) FOR CASE NUMBER S252445

Pursuant to Rule 8.204 (c)(1) of the California Rules of Court, we hereby certify that this brief contains 9,484 words, including footnotes and uses a 13-point Times New Roman font. In making this certification, we have relied on the word count function of the computer program used to prepare the brief.

Dated: June 3, 2019

Respectfully submitted,

By: _____
Jennifer Gore (SBN 232489)

By: _____
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PROOF OF SERVICE

Re: *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, et al., California Supreme Court No. S252445*

I hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party in the above entitled action, I am employed in the County of Sacramento and my business address is 915 I Street, Room 4010, Sacramento, CA 95814-2604.

On June 3, 2019, I served the attached document(s) described as

- **APPLICATION TO FILE AMICI CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES, ET AL., IN SUPPORT OF CITY OF HAYWARD ET AL.**

- **BRIEF OF LEAGUE OF CALIFORNIA CITIES, ET AL., AS AMICI CURIAE IN SUPPORT OF CITY OF HAYWARD ET AL.**

on the parties in the above-named case.

☒ BY EMAIL OR ELECTRONIC DELIVERY:

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☒ BY UNITED STATES MAIL: I served the attached document by enclosing true copies of the document in sealed envelopes with postage fully prepaid thereon. I then placed the envelopes in a U.S. Postal Service mailbox in Sacramento, California, addressed as follows:

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I, CHRISTINA WILL, declare under penalty of perjury that the foregoing is true and correct. Executed on June 3, 2019, at Sacramento, California.

CHRISTINA WILL